UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE.

AGGREGATE INDUSTRIES NORTHEAST REGION, INC.

and

Case No. 01-CA-071831

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 42

Emily Goldman, Esq., Boston, MA, for the General Counsel.

Frederick B. Finberg, Esq. (Peter Bennett, Esq.), Portland, ME, for the Respondent.

DECISION

Statement of the Case

STEVEN DAVIS, Administrative Law Judge: Pursuant to a charge, a first amended charge, and a second amended charge filed by International Brotherhood of Teamsters, Local 42 (Union) on January 4, February 22, and April 27, 2012, respectively, a complaint was issued against Aggregate Industries Northeast Region, Inc. (Respondent or Employer or Aggregate) on April 30, 2012.

The complaint alleges, essentially, that the parties met to negotiate a successor collective-bargaining agreement, and that during the course of such bargaining, the Respondent took a "take-it-or-leave-it" approach to bargaining, refused to discuss core bargaining issues upon request, refused to provide proposals concerning core bargaining issues, and declared impasse prematurely. The complaint also alleges that the Respondent, by its overall conduct, including the conduct described above, engaged in surface bargaining and failed and refused to bargain in good faith with the Union.

The complaint also alleges that on about August 5, 2011, the Respondent implemented its final offer for a successor contract proposal, including changes in wage rates, health insurance and pension contributions, seniority rules, work rules, and the attendance policy; a reduction in the hourly work guarantee; and the elimination of restrictive territory language that had guaranteed work within a certain geographic boundary to the unit members. The complaint alleges that the Respondent engaged in such conduct without first bargaining with the Union to a good-faith impasse, and changed the wages and benefits of unit employees, issued discipline to them, and otherwise adversely affected their terms and conditions of employment.

The Respondent's answer denies the material allegations of the complaint, and asserts the affirmative defenses, inter alia, that it bargained with the Union to a good faith impasse prior to the implementation of its offer; the Union failed to bargain in good faith; the Union engaged in surface bargaining; and the Union refused to meet with it.

On October 22-25, and November 19 and 20, 2012, a hearing was held before me in Boston, MA. On the evidence presented in this proceeding, and my observation of the

demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel and the Respondent, I make the following:

Findings of Fact

5

10

I. Jurisdiction and Labor Organization Status

The Respondent, a corporation having an office and place of business in Saugus, Massachusetts, has been engaged in the production of aggregate, asphalt and ready-mix concrete. Annually, the Respondent purchases and receives at its Saugus location goods valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Respondent also admits, and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

15

II. The Facts

A. The Respondent's Operations and Bargaining History

20

As relevant here, the Respondent operates a concrete plant in Saugus, and a stone quarry in Swampscott, Massachusetts. Drivers operate ready-mix trucks from the Saugus concrete plant delivering concrete to customers. Haul truck drivers operate heavy-duty haul trucks which take loads of stone to a crusher within the quarry.

25

The drivers have been represented by the Union for more than 30 years, during which time the business comprising the ready-mix and quarry operations has been owned by a series of companies, first Lynn Sand & Stone. In about 2001, the Respondent purchased the Saugus and Swampscott facilities from Bardon Trimount and began operating them as part of Aggregate Industries Northeast Region.

30

In 2001, the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit employees, defined as:

35

All employees covered by the quarry and ready-mix drivers' collective-bargaining agreement between the Union and the Respondent, which was effective by its terms from May 1, 2008 until April 30, 2011.

40

In addition to the Saugus and Swampscott facilities, the Respondent operates concrete plants and quarries throughout Massachusetts. The drivers employed at those facilities are represented by other Teamster local unions in separate bargaining units.

B. The Expired Contract and the Contested issues

45

The collective-bargaining agreement between the Respondent and the Union expired on April 30, 2011. Essentially five major issues were the subject of dispute by the parties during their negotiations: (a) territorial jurisdiction of the unit drivers (b) seniority and job bidding (c) work guarantees and health and welfare and pension benefits (d) the effect of layoff on health and welfare benefits and (e) vacation benefits.

50

¹ All references to the "General Counsel" shall, in fact, apply to the Acting General Counsel.

C. Background

Eric Winter, the Respondent's Regional Human Resources Manager, testified that the Respondent's business declined dramatically following the completion of the "Big Dig" project in Boston in 2005. He stated that with the decrease in sales, the price of concrete dropped and competition increased, resulting in the loss of millions of dollars in earnings per year. He attributed these losses to its allegedly onerous contracts with the various unions which represented its employees, stating that those contracts did not permit the Employer to operate efficiently, citing those provisions above, which were major issues in the bargaining. Winter further stated that among the various unions' contracts, that of Local 42 had the most expensive cost structure.

Winter stated that the Respondent was bidding projects at a loss, simply so that it could maintain a market share of sales. However, this strategy changed in the period 2008-2010 because it was decided that the Respondent could no longer bid work at a loss because that approach made "no economic sense." Accordingly, the Respondent bid only on work in which it could make a profit. Since the Local 42 contract was, according to him, so onerous, its bidding was limited to those jobs in which it could make a profit which for the most part, did not include the work that the drivers represented by the Union were performing.

At that time, the Respondent's drivers were not regularly working. The Saugus plant and the Swampscott quarry were closed in early 2009. The drivers worked from the Respondent's Wilmington plant, but made deliveries to the area to which they had historically delivered.

25

5

10

15

20

At about the same time, negotiations were held, and were later concluded between the Respondent and Teamsters Locals 25 and 170, which represented the drivers at the Respondent's other facilities. Contracts with each of those Locals were agreed to before the formal start of negotiations with Local 42, in May, 2011.

30

35

Respondent attorney and lead negotiator Peter Bennett testified that there was a "region-wide strategy to try to get these contracts [with Locals 25, 170 and 42] to be as similar as possible." He added that following his negotiations in April, 2011 with negotiator O'Brien for Local 25, Bennett gave his "word, since he represented the Joint Council, that the company would take a consistent approach with the other bargaining units and not embarrass him by giving someone else a substantially better deal than he got, because he made very serious concessions and actually put Boston Sand at a competitive disadvantage to [the Respondent], under this Agreement."

40

Bennett testified that, in his negotiations with Local 42, he "basically tried to focus in on what we needed and were consistent with the overall strategy that we had been following through the region."

D. The Respondent's Goals in Negotiations

45

In entering into negotiations for a successor contract, the Respondent's aim was to eliminate or change the allegedly onerous provisions of the expired contract so that it could operate profitably. It claimed that, without change, its operations could not be profitable. Examples of those contractual provisions are as follows:

50

1. Territorial Jurisdiction of the Unit Drivers

Article 7(e) of the contract provides as follows:

All concrete batched out of Salem, Swampscott, Saugus, shall be performed by Lynn Sand & Stone drivers, in order of seniority. In the event that all Lynn Sand & Stone drivers are not working days or nights, companies not covered by this agreement shall not batch concrete out of Salem, Swampscott, or Saugus locations, and shall not deliver concrete within Lynn Sand & Stone's historical job areas.

10

15

5

The term "Lynn Sand & Stone drivers" is a "term of art" referring to the Local 42 drivers involved herein, notwithstanding that the name of the employer has changed through the years.

Essentially, this paragraph means that the Local 42 drivers exclusively perform the work traditionally done in Saugus and Swampscott only as long as they are not fully employed. But if they are fully employed, drivers from other facilities owned by the Respondent and represented by other local unions may perform work traditionally done by Local 42's drivers in Saugus and Swampscott.

20

2. Seniority and Job Bidding

The parties have maintained one seniority list for all the drivers – those who are employed in the quarry and those who work as ready-mix operators.

25

Article 7(d) of the expired contract states that "drivers electing to change work assignments will notify the company by 2:00 p.m. of the preceding day of their intent." Accordingly, drivers could decide, on a daily basis, whether they wanted to work in the quarry or as ready-mix drivers the following day.

30

3. Work Guarantees and Health and Welfare and Pension Benefits

Article 9, Section 6 of the contract provides as follows:

35

When an employee is ordered to report to work the following day, in any case no later than 8:00 a.m., he shall receive 8 hours' pay, the notification to be no later than 5:00 p.m. the previous day of when the man checks out.

40

Accordingly, an employee, once called to work, was entitled to receive eight hours pay, regardless of how long he remained at work.

In addition, Article 9, Sections 3 and 4 provide that an eight hour day comprises the hours between 6:00 a.m. and 5:00 p.m., and that "all other hours worked shall be paid at the rate of time and one-half." These provisions are known as the "peg day."

45

50

Article 16, Section 1 of the expired contract provides that for each week in which an employee works at least three days per week, irrespective of hours, or 24 hours per week, irrespective of days, in a five day week schedule, the Respondent is required to make full contributions to the health and welfare fund, the Northern New England Benefits Trust, in the employee's behalf. Under the expired contract, the employees could accrue up to 2,080 hours for their pension without any weekly cap. Thus, employees could maximize their pension benefits even if they were not working for part of the year by making up the hours by working

overtime during the busier season of the year.

These provisions were important to the Union because the employees could qualify for full health and welfare benefits without working a full work-week, and, by working overtime during the busy season, could earn time toward their pension. This was critical to the Union because the Respondent's business was seasonal with ready-mix drivers not working regularly during the winter season and with the quarry occasionally being shut in the winter. Accordingly, unless the workers could work overtime they would not be able to earn their full pension benefits which were based on the number of hours for which the employee receives pay or for which pay is due.

4. The Effect of Layoff on Health and Welfare Benefits

Article 16 (4) provides that "in the event of a layoff the Employer will pay the insurance premium on regular employees for the month in which the layoff occurs." Accordingly, if an employee is laid off on the first day of the month, the Respondent is required to pay health and welfare benefits for the entire month of his layoff.

5. Vacation Benefits

20

25

30

35

40

45

50

5

10

15

The expired contract provided a graduated schedule of vacation benefits depending on the employee's length of service, with the maximum benefit of five weeks' pay for 20 years of service. Prorating of vacations was permitted by the expired contract.

E. The Negotiations

1. The Preliminary Meetings

At the negotiations, the Union was represented by secretary-treasurer Edward King, and shop steward Thomas Eaton. The Respondent was represented by its attorney Peter Bennett and Regional Human Resources Manager Eric Winter.

Bennett testified that in November, 2010, he met with Union president and business agent Alice Riley-King, and her husband, King ³ At the time, the Saugus ready-mix facility and the Swampscott quarry had been closed since early 2009, and would not reopen until 2011.

Bennett stated that he had an "open discussion with the two union officials about the Respondent's financial condition and what they could do to "get our men working again." He gave an overview of the "template" he was attempting to negotiate, "which we had basically negotiated everywhere else and that we were going to be attempting to negotiate with them." King did not recall meeting in November. On December 30, 2010, the Respondent sent King a summary of what the Employer sought.

Another preliminary meeting was held on January 20, 2011.⁴ According to King, Bennett spoke about the Respondent's distressed economic condition. The Employer wanted to

² Pursuant to Article 20 (b) of the contract, for each hour or portion thereof, for which an employee receives pay, the Respondent must make a contribution to the Pension Fund in behalf of the employee.

³ All references to "King" hereafter will be to Edward King.

⁴ All dates hereafter are in 2011 unless otherwise stated.

eliminate the territorial provision in the contract which guaranteed that other facilities' drivers could not do the work performed by Local 42 employees if those drivers were not fully employed. King explained at hearing that if that language was deleted, there was a "great possibility" that Local 42 drivers would not be working because the other locals' drivers would perform their work.

5

10

15

20

25

30

35

40

45

50

The Respondent wanted to change the daily bid to an annual bid, and have two separate seniority lists – one for the ready-mix drivers and one for the quarry drivers. The Respondent also sought to eliminate the "peg day" - overtime hours before 6:00 a.m. and after 5:00 p.m. as set forth in the contract. The Employer also wanted to eliminate the expired contract's eight-hour quarantee of work.

King rejected the Respondent's proposals, for the reasons given above in the discussion of these contractual provisions. No agreement was reached on any of these terms.

2. The Formal Bargaining Sessions

Six bargaining sessions were held, each lasting from one to one and one-half hours. Many bargaining sessions which had been scheduled were cancelled due to King's illness which cause him pain, and because he was undergoing chemotherapy which left him feeling ill and tired.

The first formal bargaining session took place on May 23. A number of minor issues were agreed to: a three year contract; change in the check off provision's enrollment date; change in the arbitration clause; an updated military leave provision; holidays; and union visitation.

The Respondent presented its proposals to the Union. The proposals included elimination of territorial language, elimination of the "peg day", wages and health and welfare benefits and pension benefits not to exceed \$36.25 per hour in year one; employees would be required to contribute to the Pension Fund contributions; elimination of prorated vacation time (an employee must work 135 days in the prior year to earn vacation benefits for the current year); eliminating seniority for use in determining layoffs of employees, but seniority and qualification are to be used to determine start times only; and the institution of an annual bid for the ready-mix and quarry positions.

Bennett testified that, in essence, these were the same proposals made in the January, 2011 meeting, but that he would be willing to consider a higher economic package.

King stated that Bennett explained how the Employer arrived at \$36.25 as its economic package. The Union agreed with some changes the Employer proposed, but not those which were of great concern to the Union, outlined above. Employer official Winter conceded that the \$36.25 economic package would result in pay cuts of nearly \$7.00 per hour for most unit employees.

The Union presented its proposal that day. It proposed no increase in wages in the first and second years, and a 50 cent raise in the third year. The overall value of its economic package amounted to approximately \$44.00 per hour which included \$27.64 per hour in wages and a 10% increase in the health and welfare and pension funds for each of the three years of the contract.

Under the expired contract, contributions to each of those funds were made entirely by

the Employer, with employees not making any contributions. The Employer counteroffered by proposing to pay 50% of the increases for each of those funds, with the employees paying the other 50%.

a. The Territorial Language – and the Union's Counteroffer

The territorial language, set forth in paragraph 7(e), above, was deemed vitally important by the Union since it preserved work for the Local 42 unit. The territorial language precluded any other local union from doing the work performed by the drivers the Union represented as long as those employees are not fully employed.

The Respondent proposed deleting this paragraph and replacing it with the following:

There are no territorial rights whatsoever for the delivery of any products produced by the Company regardless of where produced or delivered. The company will retain the exclusive right to determine the plant for production and the unit/truck for delivery.

The Respondent also proposed the "removal of any restrictive territory language and mapping that either party contends is in existence."

Winter testified that the elimination of Article 7(e) was "one of the company's top priorities.... And it never changed its position during bargaining." On the other hand, it was the Union's position, expressed by King, that , without this provision, the Respondent would "deliver out of Boston and not work this group [the Local 42 drivers] again."

The Respondent rejected this proposal.

5

10

15

25

30

35

40

45

50

b. The Respondent's Proposal of an Economic Package and the Union's Counteroffers

At the first formal bargaining session on May 23, the Respondent presented its economic package. It offered a "total economic package" to include wages, health and welfare and pension of "no greater than" \$36.25 in year one. The proposal further stated that "all increase in contribution rates imposed on or after January 1, 2011, shall be addressed in conjunction with the \$36.25 total wage, health and pension proposal."

Pursuant to the expired contract, drivers earned \$27.64 per hour. Their health and welfare and pension contributions in behalf of the employees were entirely made by the Respondent, with no contributions being made by the workers.

The Funds which administer the Health and Welfare and Pension Funds set the amount of increase in contributions necessary to maintain coverage for the employees under those Funds. The Health and Welfare Fund required a 10% increase, and the Pension Fund required an 8% increase. Union officials testified that the Union has no ability to change those required increase amounts.

⁵ The Respondent was initially advised by the Union that a 10% increase in the Pension Fund was required.

The Union told the Respondent that it was not able to negotiate concerning the changes the Respondent sought in the health and welfare agreement set forth in the expired collective-bargaining agreement – neither the amount of per centage reduction in the health and welfare contribution nor a change in the number of hours or days worked in order to accrue full benefits. The Union argued that such changes must be sought from the Fund.

5

10

15

20

25

30

35

40

45

50

Union official Thomasl Eaton testified that, given his \$27.64 wage under the expired contract, the \$36.25 total package offered by the Respondent left only \$8.61 for contributions to health and welfare and the pension funds, which, according to the Respondent's proposal, above, anything above a 5% increase would be deducted from the employees' pay.

Given that the increases in the health and welfare and pension funds were required by those funds to be 10% per year, the Respondent offered, that in years two and three of the new contract, the offer of a \$36.25 package would increase by one-half the increase in the pension rate and one-half the increase in the health and welfare rate, and further, by a 50 cent wage increase.

During the negotiations, the Employer offered to have its insurance company provide health and welfare benefits instead of the contractual New England Benefit Trust, but the Union rejected that proposal.

As set forth above, the expired contract provides that for each week in which an employee works at least three days per week, irrespective of hours, or 24 hours per week, irrespective of days, in a five day week schedule, the Respondent is required to make full contributions to the health and welfare fund, the Northern New England Benefits Trust, in the employee's behalf.

According to the Union's witnesses, the Respondent proposed that, instead of permitting employees' hours to accrue even if he did not work, only those hours which were actually worked by the employee would count toward his health and welfare benefit. In addition, the Respondent's May 23 proposal provided that employees work 2,080 hours (40 hours per week times 52 weeks) in order to qualify for health and welfare benefits. If the employee worked more than 40 hours per week, those additional hours would be banked by the Respondent and held by it for 12 months to be applied to the number of hours accrued for health and welfare benefits.

As a counterproposal to the Employer's 2,080 hour proposal, the Union proposed that the Respondent bank an additional 1,800 hours per year (150 hours per month for 12 months) beyond the 2,080 allotted hours offered by the Respondent. King suggested that the additional 1,800 hours would ensure that the workers received their full health and welfare benefit. The Respondent rejected the Union's counteroffer.

Under the liberal provision in the expired contract, the employees did not have to work a full week in order to accrue a sufficient amount of time for full health and welfare benefits. The Union's complaint was that if employees did not, in fact, work a full week for the entire year, they would not be entitled to full benefits.

The Union's economic counteroffer was \$43.62 per hour, (actually presented as \$44.00 per hour) which included wages, and 10% increases in health and welfare and pension contributions to be made by the Employer.⁶ There would be no wage increase in the first or

⁶ As noted above, the increase in the Pension Fund was 8%.

second year, and a 50 cent per hour wage raise in the third year.

According to Union officials, either at the next to last bargaining session or the final one, when the parties were discussing the recently concluded negotiations between other local unions and the Respondent, it was mentioned by Bennett that those other unions accepted a \$38.00 per hour economic package. Eaton and King said that the Union would accept \$38.00 per hour. However, Bennett rejected that offer, remarking that \$36.25 was the Employer's "bottom line."

Bennett testified that at the July 21 meeting, King stated that if the Employer froze its proposed economic package for one year, the Union would accept the contract recently offered to and agreed by the Wilmington, Local 170 drivers. Bennett stated that the Respondent was "willing to do something with it" but that offer was immediately withdrawn by King. The General Counsel argues that the Union did not withdraw its offer, and in fact, never made it because the Wilmington contract was lower than the Union's package.

c. Hours of Work

As set forth above, the expired contract provided that when an employee was "ordered to report to work the following day... he shall receive eight hours' pay...." A work day was defined as constituting 8 hours, between 6:00 a.m. and 5:00 p.m.

The Respondent proposed at the first bargaining session on May 23 that this provision be eliminated, and proposed that the eight hour guarantee of work be replaced with a four hour guarantee. The Union counteroffered that it would accept a provision for overtime after four hours. That was rejected by the Employer.

King stated that at the final bargaining session, he told the Respondent that removing the eight hour guaranty would make the formerly full-time workers into part-timers. He further stated that by working fewer hours, the employees would have difficulty obtaining sufficient hours and credits to qualify for health and welfare and pension benefits. Nevertheless, the Employer insisted on a four hour guarantee. King stated that he suggested that the parties use the same provision as McClellan, a competitor of the Respondent, which was a four hour guarantee during the slow winter season from mid-December to mid-March, and an eight hour guarantee during the rest of the year. The Respondent rejected that proposal.

Bennett explained that seniority would be applied to scheduling only. This meant that the employees would be scheduled to work based on seniority in which they would "take their first load out in the morning by seniority, but after the first load comes back we retain the discretion to decide who gets what load and once subject to the guarantees that were going to be negotiated the company then had the discretion to determine who stayed at work, who went home from work, as the work day played out." He added that "we were keeping control of discretion about how the work got parceled out and the workday played out."

The expired contract also provided that the employee was entitled to overtime pay when he worked before 6:00 a.m. or after 5:00 p.m. The Respondent proposed that "overtrime shall be paid after eight hours worked in a day or after 40 hours worked in a work week."

d. Vacation Provisions

50

5

10

15

20

25

30

35

40

45

As set forth in the expired contract, employees with 20 years of service were entitled to five weeks of paid vacation. The Respondent proposed to eliminate that benefit for any

employee hired after March 1, 2000. The Respondent also proposed that any unused vacation time not taken at the end of the employee's anniversary year would be forfeited; that an employee must work 135 days in the prior year to earn vacation benefits for the current year; and prorated vacations were no longer permitted.

5

The expired contract liberally provided that an employee with less than 10 years of continuous service who has worked "any part of 150 days will have qualified for his vacation." It also provided that employees who have not worked part of 150 days will be credited with one day of vacation for each 35 days worked...."

10

The Union counteroffered with a proposal to prorate vacation, for example, that an employee be credited with one day of vacation for each 70 days worked, instead of the expired contract's provision that he be credited with one day for each 35 days worked.

15

Bennett testified that although the Employer wanted to eliminate proration of vacations, he was willing to consider maintaining proration if the Employer could save money through other means.

e. Proposals Regarding the Elimination of Health Benefits

20

As set forth above, the expired contract provided that "in the event of a layoff the Employer will pay the insurance premium on regular employees for the month in which the layoff occurs."

25

Thus, if an employee is laid off on the first day of the month, the Respondent is required to pay health and welfare benefits for the entire month in which he was laid off.

30

Another term of the expired contract required that the Employer "continue to make a weekly contribution for [up to] 13 weeks for each employee who is absent due to sickness or injury."

The Respondent proposed to eliminate this language.

f. Seniority Issues

35

As set forth above, the parties have maintained one seniority list for all the drivers – those who are employed in the quarry and those who work as ready-mix operators. The expired contract permits employees to bid on a daily basis for jobs either in the quarry or as ready-mix drivers.

40

45

50

The Respondent proposed to have the employees bid once per year for a job in the quarry or as a ready-mix truck driver. The Union offered a counterproposal that more senior drivers be permitted to temporarily bump less senior drivers on the other seniority list. The Respondent rejected that proposal. At the last bargaining session on August 4, the Employer proposed a twice per year bid – in March and July. As part of that proposal, the four named "primary" employees would be trained in the quarry, and, in addition two ready-mix employees would be Mine Health Safety Administration (MSHA) trained as alternates in the quarry if a quarry worker was absent for five or more days. The Employer said that it would use whoever it wanted, including a management employee, if there was only a one day absence from the quarry.

The Respondent's business is seasonal, with the quarry being closed in the winter. The

daily bid system was a great benefit to the drivers with greater seniority because it enabled those drivers to bid for the ready-mix service when the quarry was closed. In addition, those ready-mix drivers who lost their drivers' licenses could bid to work in the quarry where a driver's license is not required since the haul truck was operated entirely on the Respondent's private property.

Daily bidding was useful to employees since the quarry hours were fixed, with employees starting work between 6:00 a.m. and 7:00 a.m. and ending about 3:00 or 3:30 p.m. Thus, a driver having a personal obligation in the afternoon would elect to work in the quarry that day so that he could meet that obligation. The ready-mix drivers, on the other hand, generally work a full day, being employed from the time they start work until their deliveries are complete. In addition, the Union expressed the view that, under an annual bidding system, drivers would be taking a chance in bidding to work in one area, for example the quarry, that there would be work in the quarry the entire year.

15

5

10

The Union explained that splitting the list between quarry and ready-mix removed the employee's opportunity to bid into the quarry when there was a lack of work in ready-mix. The Union also believed that employees would not have the opportunity to bid in the quarry because they were not MSHA trained.

20

25

30

35

40

The Respondent told the Union that the daily bid system was burdensome for the dispatchers. The Union countered by claiming that the daily system was not burdensome due to the small size of the unit, only 15 or 16 drivers, which takes the dispatchers 15 minutes to accomplish, and the fact that the drivers tend to keep their assignments as ready-mix drivers or quarry workers, and not interchange between the two positions.

The Respondent also claimed that a ready-mix driver who regularly drives that truck each day would be more safe and productive than an employee who also drives a haul truck in the quarry. King responded that the least senior driver has 10 years of experience with an excellent safety record.

The Respondent also proposed that if a driver was not able to report for work at the quarry, another quarry employee would be permitted to perform his work "and the Company will not be required to call in additional employees." Union officials claimed that this proposal would permit the Respondent to use non-unit employees such as supervisors, a loader-operator or a laborer to drive the haul trucks in the quarry.

Bennett denied that supervisors would perform such work, stating that another unit driver working in the quarry would perform the work. Eaton stated that quarry drivers are required to be trained by the MHSA and urged that safety considerations should preclude the Respondent's proposal. The Union also termed this proposal "dramatic" since, according to King, if the Respondent called in a replacement driver, that driver would be a unit employee and it would have to pay him from 9:00 a.m.

45

The Respondent argued to the Union that it sought these provisions to have "consistency" within the aggregate (quarry) side of the business and within the ready-mix side of the business in order to make the operation more efficient and to reduce the potential for accidents. The Employer also wanted people trained to be flexible and to be able to move around within the group – it wanted employees "cross-trained" within the guarry.

50

Bennett stated that, as a counteroffer to the annual bid issue and in order to address the Union's concerns regarding seniority and opportunities to work, he proposed that if the quarry

closed for the winter, the quarry employees would be permitted to move to the ready-mix seniority list if they had enough seniority to do so, and if they were qualified to drive the ready-mix truck.

5

10

15

20

25

30

35

40

45

50

g. The Work and Attendance Rules

The Respondent's written proposal included that the company work rules and attendance policy set forth in the contract would be deleted, and that "employees will follow the company's work rules and attendance policy." By the end of the final, August 4 session, the Respondent had not given the Union a copy of those rules.

King stated that during negotiations the Union was not given the proposed new work rules or attendance policy referred to in the last page of the Respondent's proposals, nor did the Employer discuss with the Union what rules it was proposing. The Union was first given a copy of those rules in late 2011. Employer official Winter conceded that the Respondent implemented new work and attendance rules that it had not shown the Union during negotiations. The Respondent correctly argues that its management rights clause gave it the right to "adopt... reasonable work rules and policies to manage performance and quality....", but nevertheless, there is no showing that the Union was made aware of exactly what those rules entailed.

The Respondent argued at the hearing that the attendance and work rules which were implemented had already been in effect in other areas of the Employer in 2011 as a region-wide policy.

Indeed, Bennett testified that the work rules implemented here were the same as those implemented in the hoisting engineers contract which was agreed to between the parties prior to the start of the drivers' contract. However, that contract is not in evidence. Rather, the proposals concerning the work and attendance rules presented by the Employer in the hoisting engineers' negotiations are in evidence. They state, as the same proposals stated here, that the company work rules and attendance policy would be deleted and employees will follow the company's work and attendance rules. In testifying about the negotiations for the hoisting engineers contract, Bennett stated that "work rules came up and there was no real discussion." Mr. King agreed to remove the work rules from the back of the contract," adding that that was the same proposal the Respondent made in the subsequent drivers' negotiations.

Bennett argued that King and the Union were aware of those rules. That claim is undermined by the Respondent's brief, footnote 25, which states that the Union "accepted the change [in work rules] without seeing any new work rules...." King and the Union's representatives stated, however, that they did not know specifically what those rules were.

It may be that the Union agreed to the Respondent's rules in the hoisting engineers contract without knowing what they were, but here, it cannot be said that the Union agreed to those rules. Indeed, King testified that during the bargaining the Respondent never discussed with him what it was proposing, and the Union was not given those rules during the drivers' bargaining negotiations. There is no support for the Respondent's claim in its brief, page 52, that "by his own admission, Mr. King and Attorney Bennett had discussed the exact same work rule proposal as part of the hoisting engineers' negotiations and Mr. King had agreed to the exact same proposal that would apply to workers working side by side with and under the same supervision as any employee in the driver unit whose assignment was in the quarry." King only agreed that the contractual rules would be eliminated. However, there is no evidence that he knew what the new rules encompassed.

h. The Respondent Declares Impasse

King testified that at the July 26 bargaining session, Bennett said that the Respondent was anxious to make capital investments in the quarry and they "had to know where they stood. They were coming to the end of the line with negotiations. And they were going to implement the agreement after our last session...." King replied that he and his negotiators were not in agreement – "we want to continue bargaining."

A meeting scheduled for July 27 was cancelled due to King's poor health.

10

15

20

25

5

By letter dated July 29, Bennett wrote to King, modifying the Respondent's proposal regarding seniority. Specifically, the letter stated that if the quarry closes for the winter season, the quarry employees may use their seniority and move to the ready-mix list provided the employee is qualified to perform the available work. In addition, the letter noted that, had the parties met on July 27, the Respondent would have presented its "solution to the changes imposed by the New England Benefit Trust." Its solution included the Respondent's offer to bank its excess contributions on certain terms.

The letter concluded that, as he suggested at their July 26 meeting, "the offer presented yesterday, with the changes noted above, is a final offer. Given the threats of a nationwide strike and filing of Board charges that you have made, we wanted to be sure that the men had a chance to review the Company's offer in advance."⁷

Bennett explained that he sent the letter because there was "growing concern about where the negotiations were going. We were well beyond expiration. We are nearing the end and I thought it important to get certain information across to the other side."

King called Bennett after he received the letter and asked him "what the sudden emergency is. The guys haven't really worked or they've worked very sporadically in the last year or year and a half. So what all of the sudden is the big emergency about getting this wrapped up." He quoted Bennett as saying that the "company had to move forward." King replied that he was not in agreement and that they needed more time to meet and try to conclude the contract.

35

30

King testified that he told Bennett that "under no circumstances would he give up the restrictive territory language" telling him that the Union could not give up that clause – that the "guys would never work again – we were sticking to our position on it." King also "probably" told Bennett at that time that the Union would never agree to a four hour guarantee of work and would not agree to the Respondent's cost-sharing health and welfare and pension proposals.

40

F. The Final Bargaining Session

At the conclusion of bargaining on August 4, the positions of the parties, as stated by Bennett, was that, according to the Union, "there'd never be an agreement without it [the territorial guarantees in the expired contract] and the company's position was there'd never be an agreement with it."

According to the expired contract, the Union had historically worked in a large area. King

50

⁷ At the July 14 meeting, the Union threatened to strike the Employer if \$36.25 was the "bottom line."

testified that at the final bargaining session on August 4, he made a counteroffer to reduce the territory that the Union would deliver to, in other words, to eliminate much of its historic territorial jurisdiction, by agreeing to work in a limited number of cities – Beverly, Danvers, Lynn, Peabody and Salem which are located close to the Respondent's plants in Saugus and Swampscott. Those cities had been agreed to by the Respondent and Local 25 in their recently concluded negotiations. The Respondent rejected this proposal.

5

10

15

20

25

30

35

40

45

50

On August 4, the parties met for their last negotiation session. Bennett testified that, at the end of that session, he said that that the parties were at impasse. Bennett testified, when asked why he concluded at that session that that the parties were at impasse:

We kept explaining our positions, the reasons for the positions, and what we were trying to accomplish. The Union never came back with any interest in compromise or meaningful solutions on any of the major issues. It was basically "we're not interested. We're going to strike you. Your proposal's crap", et cetera. There was no indication that the union would compromise or come up with some type of a workable solution."

King responded to Bennett that the parties had not discussed everything. Bennett said that he was "willing to discuss anything you want... and we need to move forward and get this resolved." King did not recall Bennett's offer to discuss anything he wished.

King testified that when Bennett said that the parties were at impasse, King said, referring to the work rules, that "we've never discussed those and we've never negotiated those policies." According to King, Bennett stood, became angry, gathered his papers and said he was "motherfuckin done, just don't go there. Don't fucking go there. I'm all done. We're at impasse. We have to vote your members and we're going to implement the contract next Wednesday." King repeated that the parties had not discussed the work rules issues at all, exclaiming that they were not at impasse and that the Union was ready to bargain and would like to bargain about those issues. Bennett then repeated that they were at impasse, and then left the room.

Bennett and Winter denied the Union's representatives' version of the end of that meeting. They denied that Bennett stormed out of the room, adding that they remained and spoke about a grievance concerning employee Nick Gallo. In fact, Bennett testified that after discussing many issues at the meeting, King declared "we're done for the day," and Bennett said that "we remained at impasse, we needed to move forward and at that point we intended to implement." According to Bennett, King then said that he "disagreed" because the employees have not voted on the Employer's offer. Bennett responded that they can vote any time they want.

Bennett conceded that the "system" the Respondent proposed was not the only system, "but it was the one that every other Teamster Local had agreed to, including this Local with the Hoisting Engineers on vacation, and most of these other things. And the only exception was here and in New Hampshire where our disagreement at impasse was down to starting time and not much more."

On August 10, Bennett mailed the Respondent's final offer to King, stating that if it was not accepted by August 17, the Employer intended to implement it.

The Union's members voted on the Employer's final proposal, unanimously rejecting it.

G. Implementation of the Respondent's Final Offer

The Respondent implemented its final proposal in August, 2011. Bennett admitted that the "major elements" of the implemented proposals were "pretty much the same:" as those that the Respondent proposed at its first bargaining session on May 23, 2011. For example, the Respondent eliminated the territorial language from the expired agreement; eliminated a stated start time; reduced the guaranteed eight hour work day to a four hour work day; eliminated overtime pay outside the hours of 6:00 a.m. and 5:00 p.m; reduced vacation benefits; eliminated daily bidding; instituted separate seniority lists; and eliminated the continuation of health and welfare benefits during the month of a driver's layoff.

The Respondent implemented its economic package which was virtually identical to the package it originally proposed.

Regarding contributions to the pension plan which required a 10% increase in contributions, the Respondent implemented a program whereby it would pay 5% of the increase and the employees would pay 5%.

H. The Work and Attendance Rules

20

25

30

5

10

15

The Respondent implemented work and attendance rules which differed from the expired contract's rules. For example, the expired contract provides for one point for each unexcused absence and one-half point for each tardiness. The implemented work rules assigned a two point assessment for an unexcused absence and a one point assessment for each instance of tardiness.

In the expired contract, eight points warranted a two day suspension, whereas under the implemented rules, six points warranted a three day suspension without compensation, and eight points was sufficient for discharge. The expired contract also provided that employee points would be expunged nine months after the receipt of those points. The implemented rules contain no such provision.

Employees have received points under the implemented work rules.

Analysis and Discussion

35

40

45

I. Credibility

There is no material dispute concerning the basic facts presented here – the issues over which the parties were bargaining. There were some minor differences between the Respondent's and Union's witnesses concerning discrete areas of testimony, but none which fatally impaired their credibility. Nor do they change the decision in this case.

For example, when Bennett declared impasse at the last session and King replied that the parties have not discussed the work rules, Bennett responded that they could speak about anything they wanted. The Union's witnesses denied hearing that response of Bennett. Even if Bennett did not invite the parties to continue the bargaining, about the work rules or other disputed issues, I find, below, that that discussion would not have affected the outcome of the bargaining.

50

II. The Allegations Concerning the Respondent's Alleged Bad Faith Course of Bargaining

The complaint alleges that during the course of bargaining, the Respondent took a "take-it-or-leave-it" approach to bargaining, refused to discuss core bargaining issues upon request, refused to provide proposals concerning core bargaining issues, and declared impasse prematurely. The complaint also alleges that the Respondent, by its overall conduct engaged in surface bargaining and has failed and refused to bargain in good faith with the Union.

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board summarized its views on surface bargaining. The Board began by stating the obligation of the parties under Section 8(d) of the Act to meet and confer in good faith, "but such obligation does not compel either party to agree to a proposal or require the making of a concession." Although the parties have a duty to negotiate with a sincere purpose to find a basis of agreement the Board cannot force a party to make a concession on any specific issue. An employer's overall conduct must be scrutinized to determine whether it has bargained in good faith. The total conduct will show whether an employer is lawfully engaging in hard bargaining or unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party may stand firm on a position based on a reasonable belief that it is fair and proper or that "he has sufficient bargaining strength to force the other party to agree." Thus, adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith. Conduct indicative of a lack of good faith includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings.

There is no evidence in the record that the Respondent made any unilateral changes in mandatory subjects of bargaining, that it engaged in efforts to bypass the Union, that it failed to designate an agent with authority to bargain, that it withdrew agreed upon provisions or that it scheduled meetings arbitrarily. Further, the evidence recited above shows that the Employer always responded promptly to the Union's requests for collective-bargaining meetings.

It is true that the Respondent sought to obtain the same terms and conditions it achieved in bargaining with this Union in the hoisting engineers contract which concluded only one month before bargaining began in this drivers' contract. It further sought to obtain the same terms and conditions it obtained with other Teamster unions in its bargaining in other units which were employed by the Respondent.

The General Counsel argues that, by such conduct, the Respondent entered into negotiations with a fixed intent to obtain the identical terms it had secured in other bargaining and therefore engaged in a "take-it-or-leave it" approach to bargaining, in which it would accept nothing less than the terms it previously secured. The General Counsel argues from this that the Respondent engaged in surface bargaining, merely going through the motions of bargaining in order to satisfy its statutory obligation to bargain, without bargaining with a sincere intent to reach agreement.

In *National Gypsum Company*, 359 NLRB No. 116 (2013), a union representative had stated that the union would not accept the employer's retirement proposals which were an attempt to destroy retirement benefits, and, as here, the employer responded that the union had accepted the same exact proposals at four other facilities represented by the union. The union replied that those proposals should not have been accepted and that the union was going to do everything it could to "reverse the trend" toward such plans. In finding that impasse had occurred, the Board stated that the respondent "had steadfastly held to its two proposals and made clear that it was unwilling to accept concessions on other issues in return for dropping them, and the union, in turn, made it clear that it would not accept the two proposals...." slip op.

at 1.

5

10

15

20

25

30

35

40

45

50

After impasse was declared by the employer in *National Gypsum*, the union said that it did not believe that the parties were at impasse, and that it was ready to continue bargaining. The employer replied that it appeared clear that the union had no intention of modifying its position on the issues "critical to the reaching of an agreement."

In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. However, the fact that an employer seeks concessions does not, of itself, warrant a conclusion that the employer is bargaining in bad faith. *Atlanta Hilton & Tower*, above.

Here, the Respondent and the Union adamantly took positions on critical issues vitally important to each of them, and about which each was unwilling to yield. Thus, the Employer insisted on the elimination of the territorial guarantees in the expired contract and the Union refused to surrender that issue, claiming that the drivers would not receive any work if that provision was eliminated. Similarly, the Union told the Respondent that it would never agree to a four hour guarantee of work and would not give up its eight hour guarantee in the expired contract, and that it would similarly not agree to the Respondent's cost-sharing health and welfare and pension proposals whereby the employees would be required to share the cost of those funds' increases.

These critical issues were discussed at each bargaining session. The Respondent presented its reasons for requesting these changes in the expired contract, offering rational, economic-based explanations for demanding concessions in the terms set forth in the expired contract. It set forth its dire economic situation in the very first meeting with the Union, even before formal negotiations began. Its conduct was reasonable, supported by the fact that the Union, in the hoisting engineers contract, agreed to the same provisions, and that other Teamster unions representing employees in other units employed by the Respondent, also accepted those same terms.

The General Counsel argues that the fact that the Union agreed to the terms of the hoisting engineers contract is not probative because the circumstances relating to the hoisting engineers' job duties differ markedly from those in the drivers' unit. The Union argues that the hoisting engineers is a relatively small unit, they are a distinct craft and do not transfer between the quarry and ready-mix job duties. Nevertheless, regardless of the job duties of the engineers compared to the drivers, the terms and conditions of employment agreed to by the Union for that unit were the same as those sought by the Respondent in the drivers' contract negotiations.

Here, as in *National Gypsum*, the Respondent was entitled to adhere to its positions as was the Union. I cannot find, under these circumstances, that the Respondent took a "take-it-or-leave-it" approach to bargaining, refused to discuss core bargaining issues upon request, refused to provide proposals concerning core bargaining issues, or by its overall conduct engaged in surface bargaining.

III. The Allegations that the Respondent Unlawfully Declared Impasse and Implemented the Terms of its Final Offer

The complaint also alleges that the Respondent violated the Act when it implemented its final offer for a successor contract proposal, including changes in wage rates, health insurance and pension contributions, seniority rules, work rules, and the attendance policy; a reduction in the hourly work guarantee; and the elimination of restrictive territory language that had

quaranteed work within a certain geographic boundary to the unit members.

The complaint alleges that the Respondent engaged in such conduct without first bargaining with the Union to a good-faith impasse, and changed the wages and benefits of unit employees, issued discipline to them, and otherwise adversely affected their terms and conditions of employment.

The Board has long held that "when, as here, parties are engaged in negotiations [for a collective-bargaining agreement], an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." NLRB v. Katz, 369 U.S. 736 (1962); Pleasantville Nursing Home, 335 NLRB 961, 962 (2001), citing Bottom Line Enterprises, 302 NLRB 373 (1991). An employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals without reaching a bargaining impasse. Cotter & Co., 331 NLRB 787, 787-788 (2000). The Board has recognized two limited exceptions to this overall impasse rule: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." Bottom Line, above.

20

25

30

15

5

10

I have found, above, that the Union did not avoid or delay bargaining, and there is no claim that economic exigencies compelled immediate action. The Respondent argues that an impasse in bargaining was reached.

IV . Did the Parties Reach an Impasse in Bargaining?

In Taft Broadcasting Co., 163 NLRB 475, 478 (1967), the Board defined impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." As later set forth in Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973) the Board stated:

35

40

45

50

A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.

With the entire course of bargaining as background, the Board defines impasse "as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile... Both parties must believe that they are at the end of their rope." AMF Bowling Co., 314 NLRB 969, 978 (1994); Richmond Electrical Services, 348 NB 1001, 1002 (2006); ACF Industries, 347 NLRB 1040, 1042 fn. 4 (2006).

The burden of demonstrating the existence of impasse rests on the party claiming impasse - here the Respondent. Serramonte Oldsmobile, Inc., 318 NLRB 80 97 (1995). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are the "bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." Taft, 163 NLRB at 475.

The General Counsel correctly observes that "the Board does not lightly find that an

impasse has taken place. It requires that the parties have reached that point ... in negotiations when the parties are warranted in assuming that further bargaining would be futile. Futility is what must appear, not some lesser level of frustration, discouragement or apparent gamesmanship." *CJC Holdings*, 320 NLRB 1041, 1044 (1996).

5

10

15

20

A. The Factors

1. Bargaining History and the Length of the Negotiations

The Respondent recognized the Union as the representative of its drivers in 2001. The prior contract ran from 2008 to 2011. The contract negotiations at issue is the bargaining which took place to succeed that agreement.

Six bargaining sessions were held over a period of three months. Although there were relatively few formal bargaining sessions, some of which were reduced in length due to King's illness, the bargaining concerning the major issues which separated the parties was intense. There were also informal sessions held before the formal negotiations took place.

It is significant that the parties successfully negotiated a contract involving the hoisting engineers unit, which concluded just one month prior to the start of the instant negotiations with the drivers' unit. That contract contained virtually all of the Respondent's proposals as those negotiated in the drivers contract. The lead Union agent in both negotiations was King.

2. Good Faith

25

30

35

"Both parties have a duty to negotiate with a sincere purpose to find a basis of agreement, but an adamant insistence on a bargaining position is not of itself a refusal to bargain in god faith." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). I find that neither party refused to bargain in good faith. Both parties discussed their proposals freely over the course of bargaining, and although I find that the Respondent failed to present its proposals concerning its proposed work and attendance rules, such a failure did not taint the negotiations in chief concerning the significant issues which created the impasse. The critical issues of territorial jurisdiction of the unit drivers, seniority and job bidding, work guarantees and health and welfare and pension benefits, and the effect of layoff on health and welfare benefits and vacation benefits were discussed at each meeting. There were no major changes in the parties' positions on the major issues during the course of bargaining.

The Respondent could reasonably believe that its proposals would be accepted, as the Union in representing the hoisting engineers accepted those proposals.

40

45

The parties' good faith in negotiations has been subject to question on both sides. The complaint alleges that the Respondent's bargaining has not been in good faith, and the Respondent questions the Union's good faith intent to reach agreement. The Respondent argues that the Union cancelled a number of sessions, unfortunately, due to the ill health of King, but there was no showing that the cancellations were deliberately done to thwart or delay bargaining. In addition, the Union's \$44 per hour proposal was raised slightly by 38 cents per hour over its initial offer.

50

The Respondent's actions during bargaining, particularly taking a hard but consistent approach to its proposals, do not permit me to find that its negotiation tactics support a finding that it did not intend to reach agreement. As noted in *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952), "the Act does not encourage a party to engage in fruitless marathon

discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." I find that although Respondent did not meaningfully yield on the major proposals, it was not required to do so.

5

10

3. The Importance of the Issue Preventing Agreement

15

20

25

30

35

40

Although impasse typically requires an overall deadlock in bargaining, the Board has recognized that an impasse on a single critical issue may cause such a complete breakdown in negotiations that a suspension in bargaining is justified. The party asserting a single-issue impasse must establish three things: "first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *Erie Brush & Mfg. Corp.*, 357 NLRB No. 46, slip op. at 2 (2011), rev. 700 F.3d 17 (2nd Cir. 2012), citing *CalMat Co.*, 331 NLRB 1084, 1098 (2000).

In *ACF Industries*, 347 NLRB 1040, 1041 (2006), in finding that the respondent had bargained in good faith to a valid impasse, the Board noted that the parties were far apart on a number of significant issues when the employer declared impasse, and the employer's "economic positions were the essence of hard bargaining, not bad-faith bargaining, and that the union's unwillingness to accept the proposals, which that bargaining posture produced, left the parties at impasse."

Here, as in *ACF*, the Respondent "informed the Union before negotiations began that its economic conditions necessitated major concessions in wages and benefits."

I find that the Union did make proposals on the major disputed issues. The Union made a counteroffer in which it offered to limit its territorial jurisdiction in the expired contract to five cities. I do not credit Bennett's testimony that the Union did not make such a counteroffer. In fact, Bennett testified that on July 29, King mentioned five cities and he (Bennett) "tried to talk him out of it...."

In addition, Union negotiators King and Eaton testified that the Union lowered its economic package offer from \$44.00 per hour to \$38.00 per hour, offering to accept the same amount that the Local 25 Metro drivers accepted in its contract with the Respondent. There is some uncertainty as to Eaton's testimony, however, because he stated that during negotiations, "at no time did the Union indicate it was willing to take less than \$44 per hour...." Eaton did not include that offer in his notes of that bargaining session or in his Board affidavits. Bennett denied that the Union made such an offer.

45

50

Further, there was negotiation concerning the "peg day" in which the expired contract required the payment of time and one-half for hours worked outside the hours of 6:00 a.m. and 5:00 p.m., and the eight hour guarantee of work. The Respondent proposed to have start times only determined by seniority, with the assignment of work during the day being discretionary with the Employer. The Employer also proposed to reduce the guarantee of work to four hours. The Union counteroffered to have a four hour guarantee during the slow season and an eight hour guarantee the rest of the year. The Union also proposed that the Employer pay overtime

after four hours with a 9:00 a.m. start time.

As set forth above, the Respondent proposed eliminating the fifth week of vacation for employees hired after March 1, 2000, and that the employees would forfeit any unused vacation; no proration of vacation benefits, and that the drivers would have to work 135 days per year rather than having to work any part of 150 days as set forth in the expired contract. The Union counteroffered with a proposal to prorate vacation, for example, that an employee be credited with one day of vacation for each 70 days worked, instead of the expired contract's provision that he be credited with one day for each 35 days worked.

10

15

20

25

30

35

40

45

50

5

The Respondent proposed to replace the single seniority list in which employees could bid daily for positions in the quarry or as ready-mix drivers, with the requirement that drivers bid once per year for a position either in the quarry or as a ready-mix driver. The Union offered that, if two seniority lists were implemented, that senior drivers be permitted to temporarily bump less senior drivers on the other list. The Respondent made a counteroffer that drivers be permitted to bid twice per year.

There was some movement, and proposals and counterproposals in the areas set forth above. However, by the end of the August 4 session, I find, as did the Board in *National Gypsum Company*, above, that although both parties offered proposals and counterproposals at the bargaining sessions, "there was no evidence that the Union had anything more to offer" on August 4 that "would have altered the Company's steadfast position on those issues."

The General Counsel claims that impasse was declared prematurely because the work and attendance rules had not been discussed, nor had the actual rules which the Respondent intended to implement been presented to the Union.

"Parties need not reach impasse on all bargaining issues before an employer may lawfully implement its bargaining proposals. A single issue ... may be of such overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues." (emphasis in original) *Calmat Co.*, 331 NLRB at 1097 (2000).

The General Counsel argues that the Respondent failed to bargain with the Union concerning the work and attendance rules, and that such a failure constitutes a violation of Section 8(a)(5) of the Act. As set forth above, the Respondent's proposal that the work and attendance rules set forth in the expired contract be deleted and that the Employer's rules be implemented were listed in its proposal from the very beginning of the negotiations. The Union did not question that proposal until the last bargaining session and then, as a last ditch effort to forestall the declaration of impasse, protested that no bargaining had taken place on that issue. See *ACF*, above, at 1043.

Even assuming that the Respondent did not bargain about the work and attendance rules, even if the rules were not discussed, and assuming that agreement had not been reached concerning them, it is clear that those circumstances would have been insufficient to break the impasse over the critical issues which were great importance to the parties. *Richmond Electrical Services*, 348 NLRB 1001, 1003 (2006) where, although progress on matters such as arbitral entity and drug testing was made, impasse on wages prevented agreement from being reached; *Calmat Co.*, 331 NLRB 1084, 1097 (2000), where progress on issues such as vacation and holiday leave was insufficient to break an impasse over the critical issue of a pension plan. In *Calmat*, the Board stated that "because we conclude that the parties reached impasse on the critical issue of the pension plan, it is unnecessary for us to determine whether the parties also reached impasse on the other areas of bargaining." 331 NLRB at 1099, fn. 55.

The issues concerning the territorial jurisdiction of the unit drivers, seniority and job bidding, work guarantees and health and welfare and pension benefits, and the effect of layoff on health and welfare benefits, and vacation benefits "pervaded the negotiations." From the start the Respondent stressed the significance of those issues. The Union equally stressed its desire not to cede on certain of these issues.

5

10

15

20

25

30

35

40

45

50

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if that issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations. *Calmat Co.*, 331 NLRB at 1087 (2000).

The Board found in *National Gypsum*, above, that "resolution of the ... issues on which the parties were consistently furthest and most fundamentally apart ... were of vital importance and critical to reaching agreement."

At the final session on August 4, the Union did not offer to continue bargaining on the issues that were of critical importance to them. Rather, the Union requested bargaining on the work and attendance rules, which were of incidental importance when considering the major issues the parties dealt with.

The General Counsel asserts that the Union did not know what the work and attendance rules were that the Respondent intended to implement. Significantly, at the last bargaining session, the Union did not protest that it did not know what the rules were. It only protested that the Employer had not bargained about them. Indeed, the Union had not sought to bargain about those rules and did not question the Respondent concerning them during the course of the bargaining. Thus, if the Respondent did not provide the Union with the actual rules it intended to implement, such failure had a negligible impact, if any, on the parties' negotiations.

After an impasse is reached, an employer may not make changes that were not encompassed within its last offer, indeed never even been mentioned, because that is "necessarily inconsistent with a sincere desire to conclude an agreement with the union." *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *United Contractors, Inc.* 244 NLRB 72, 73 (1979).

"Even if a legitimate impasse existed, the respondent could make a unilateral change only if the change was 'reasonably comprehended under [the respondent']pre-impasse proposals." *GHR Energy Corp.*, 294, NLRB 1011,1015 (1989).

Here, I find that the changes in the rules were consistent with the Employer's proposals since the proposals stated that "employees will follow the Company's work rules and attendance policy." Those rules were in effect at other Employer facilities and were in existence at the time the proposals were presented to the Union.

However, the critical issues which resulted in adamant positions from both the Respondent and the Union remained at the end of bargaining on August 4. Neither party materially altered its position throughout the course of negotiations. These were the central, critical issues which caused complete failure in negotiations and an overall bargaining impasse. Although the Union expressed a willingness to continue bargaining at the time that the Respondent declared impasse, I do not find these expressions probative of the issue in light of the Union's declarations that it would not yield on those issues in any material way. Thus, a complete breakdown on all issues occurred because the critical issues remained unresolved and destroyed the chances of reaching agreement.

JD(NY)-30-13

4. The Parties' Understanding as to the State of Negotiations

"For impasse to occur, both parties must be unwilling to compromise." *Grinnell Fire Protection Systems Co.*, 328 NRLB 585, 585 (1999) or believe that further proposals could no longer be fruitful. *Huck Mfg. Co. v. NLRB*, 693 F.2nd 1176, 1186 (5th Cir. 1982); *Larsdale, Inc.*, 310 NLRB 1317, 1318 1993). "Impasse can exist only if both parties believe that they are 'at the end of their rope." *Cotter & Co.*, 331 NLRB 787, 788 (2000). Thus, there must be a contemporaneous understanding by both parties that they had reached impasse. *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817, 841 (2004).

10

15

5

As set forth above, at the conclusion of bargaining on August 4, the positions of the parties, as stated by Bennett, was that, according to the Union, "there'd never be an agreement without it [the territorial guarantees in the expired contract] and the company's position was there'd never be an agreement with it." Also, as set forth above, Winter testified that the elimination of Article 7(e) was "one of the company's top priorities.... And it never changed its position during bargaining." On the other hand, it was the Union's position, expressed by King, that , without this provision, the Respondent would "deliver out of Boston and not work this group [the Local 42 drivers] again."

20

Thus, both parties stated clearly to each other that each would not accept the other's proposals on territorial jurisdiction. They were also adamant on the other critical issues set forth above. Although there was some movement on the issues, I find, as in *National Gypsum Company*, that "there was no reasonable basis for the union to believe that continued bargaining on August 4 would have been fruitful. Nor do I believe the Union really believed [that continued bargaining would be fruitful] notwithstanding [the Union representative's comments on August 4] that he was prepared to continue bargaining."

30

25

The test for determining whether impasse occurred is whether a genuine impasse existed at the time impasse was declared. *Standard Motor Products*, 331 NLRB 1466, 1491 (2000). Accordingly, I find, as set forth above, that on August 4, a genuine impasse existed. Whether or not the Union requested additional bargaining concerning the work rules does not change my finding that impasse existed. Further bargaining on that subject, and agreement thereon would not have altered the deadlock on the critical issues that existed on August 4. Moreover, the change in the work rules had been listed on the Respondent's proposals since the first session and no meaningful bargaining had taken place, and the Union had not requested bargaining on that subject before the last meeting.

40

35

In finding that impasse occurred, the Board in *National Gypsum Company*, 359 NLRB No. 116 (2013) cited as a factor that the respondent "flatly rejected" a proposal that it withdraw its economic proposals and a union representative stated that the union would not accept the employer's retirement proposals. This is similar to the state of negotiations on the critical issues that existed here on August 4.

45

Accordingly, for all of the foregoing reasons, I find that a preponderance of the credible evidence establishes that the parties did, in fact, reach a genuine impasse at the August 4 bargaining session.

Conclusion

50

Inasmuch as I find that the parties had reached an impasse in bargaining, the Respondent's actions in implementing the terms of its proposals were not unlawful. I also find that the Respondent met its obligation to bargain in good faith with the Union.

Conclusions of Law

- 1. The Respondent, Aggregate Industries Northeast Region, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
 - 2. The Union, International Brotherhood of Teamsters, Local 42, is a labor organization within the meaning of Section 2(5) of the Act.
 - 3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended $^{\rm 8}$

15 ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C., June 24, 2013.

Steven Davis Administrative Law Judge

25

20

10

30

35

40

45

8 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.